

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

4 KPM Analytics North America )  
5 Corporation, )  
6 Plaintiff, )  
7 )  
8 vs. ) Civil Action No. 21cv10572-MRG  
9 )  
10 )  
11 Blue Sun Scientific, LLC, )  
12 The Innovative Technologies )  
13 Group & Co., Ltd., Arnold )  
14 Eilert, Michelle Gajewski, )  
15 Robert Gajewski, Rachael )  
16 Glenister, Gregory Israelson, )  
17 Irvin Lucas, and Philip )  
18 Ossowski, )  
19 Defendants. )

14 BEFORE: The Honorable Margaret R. Guzman

## Video Conferenced Motion Hearing

United States District Court  
Courtroom No. 2  
595 Main Street  
Worcester, Massachusetts  
June 21, 2021

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Official Court Reporter  
United States District Court  
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Worcester, MA 01608-2093

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## PROCEDINGS

2 (The following proceedings were held remotely before  
3 the Honorable Timothy S. Hillman, United States District Judge,  
4 United States District Court, District of Massachusetts, on  
5 June 21, 2021.)

6 THE CLERK: Case No. 21-10572, KPM Analytics North  
7 America Corporation versus Blue Sun Scientific.

8 Counsel, please note your appearance for the record.

9 MR. MAGEE: My name's Scott Magee. I'm from Morse on  
10 behalf of the plaintiff KPM and Wilt.

11 MR. PRICKETT: Your Honor, William Prickett and Dallin  
12 Wilson from Seyfarth Shaw on behalf of the individual  
13 defendants.

14 Mr. Wilson will be doing the argument.

15 MR. RITCHIE: Good afternoon, your Honor. George  
16 Richie and Roy Craig on behalf of the entity defendants, Blue  
17 Sun Scientific and Innovative Technologies Group.

18 I will be doing the argument for those entities, the  
19 defendants.

20 MS. DAVIS: Good afternoon, your Honor. I'm Marie  
21 Davis, local counsel to the entity defendants.

22 THE COURT: All right. And good afternoon to all of  
23 you.

24 So we've got an hour, and so we'll split it up  
25 30 minutes for the plaintiffs -- plaintiff rather, and

1 30 minutes for the defendants.

2 Why don't -- Mr. Richie, why don't you start with  
3 Document 20, which is your motion to dismiss on behalf of Blue  
4 Sun and ITG.

5 MR. RITCHIE: Of course, your Honor. And, your Honor,  
6 if I may, again, George Ritchie on behalf of Blue Sun and ITGC.

7 I'm going to address the jurisdictional issues and a  
8 couple of the issues that are 12(b)(6).

9 If it's okay with the Court, I'm going to let  
10 Mr. Dallin [sic] address some of the 12(b)(6) issues that are  
11 common to all the defendants.

12 THE COURT: Okay. That's good. So let me -- let me  
13 hear you first, and then I'll decide, or I think maybe what  
14 I'll do is I'll ask defendants whether they want to respond or  
15 wait until the end.

16 So go ahead.

17 MR. RITCHIE: Okay. Thank you, your Honor. Again,  
18 George Ritchie on behalf of the entity defendants.

19 Your Honor, we filed a motion to dismiss plaintiff's  
20 complaint in this matter pursuant to Rules 12(b)(1) and  
21 12(b)(6).

22 As the Court knows, the rule -- the motions under  
23 12(b)(1) address the question of whether or not this Court has  
24 personal jurisdiction over ITGC and Blue Sun. For the reasons  
25 that I'll explain and are set forth in my paper, we do not

1 think that this Court does have personal jurisdiction over  
2 these defendants.

3 And I misspoke, your Honor, it's 12(b) (2). I  
4 apologize. Not 12(b) (1), the personal jurisdiction.

5 In -- in order to establish personal jurisdiction over  
6 a defendant, a plaintiff bears the burden of proving that the  
7 jurisdiction lies in the forum state and a plaintiff may not  
8 rely on supported allegations in its pleading, but must rather  
9 come forth with specific facts that demonstrates the  
10 jurisdiction exists.

11 Of course, to establish personal jurisdiction, a  
12 plaintiff must meet both the requirements of the Massachusetts  
13 long-arm statute and the due process clause of the Fourteenth  
14 Amendment of the U.S. Constitution. The requirements under  
15 Massachusetts long-arm statute are similar to but not  
16 necessarily the same as those imposed by the due process  
17 clause.

18 Importantly, in the exercise of jurisdiction under the  
19 long-arm statute is only proper if it is consistent with one of  
20 the enumerated eight grounds that the statute identifies.

21 Plaintiff alleges generally in its complaint that this  
22 Court has such jurisdiction under the long-arm statute but does  
23 not really get the complaint addressed specifically why or  
24 which factor would apply.

25 Looking through the factors that could potentially

1 apply to the entity defendants in this case, we can see that  
2 MGL 2 -- 223A, Section 3(b), which relates to whether or not  
3 the defendant has an interest in real property does not apply  
4 here.

5 We have set forth an affidavit in our moving papers by  
6 Mr. Robert Wilt, who is the chairman of Blue Sun and ITGC that  
7 sets forth that these are, in fact, Maryland entities,  
8 incorporated in Maryland, with a principal place of business in  
9 Maryland. With the exception of some very limited commercial  
10 activity by ITGC in this Commonwealth, there is no business  
11 activity by these defendants in the Commonwealth. And neither  
12 of these defendants have real property. Neither of these  
13 defendants have a contract to insure any person or property  
14 under 223 3(f) and so, therefore, that subsection does not  
15 apply.

16 In -- In their opposition to our motion, the  
17 plaintiffs cite to 223A and 3(c) in which they allege that, in  
18 fact, these entity defendants have caused tortious injury in  
19 the Commonwealth by an act or omission in the Commonwealth.  
20 And we don't think for the reasons that I'll describe, your  
21 Honor, that this particular subsection applies.

22 There are no allegations of any commercial activity by  
23 these defendants that relate to the claims in this matter save  
24 for two that the plaintiff identified in their opposition to  
25 the motion to dismiss.

1                   First, that paragraph 16, plaintiff alleges they  
2 believe that Blue Sun, not ITGC, but Blue Sun regularly  
3 communicated with employees of plaintiff, a Massachusetts-based  
4 employer.

5                   I'll be candid when I first read that allegation and I  
6 read the moving papers, I assumed that that meant that the  
7 allegation was that Blue Sun communicated with the individual  
8 defendants, although as I read it again now, that's not clear  
9 to me at all, that that is -- that's what plaintiff is  
10 referring to. Plaintiff just simply says employees of the  
11 plaintiff. So I don't know whether those refer -- those  
12 allegations refer to communication of the individual defendants  
13 or some other employees of the plaintiff. Either way this  
14 allegation on its own is sufficient for the exercise of  
15 personal jurisdiction over these entities. We've cited cases  
16 to the effect, it's simply -- simple communications unrelated  
17 to the allegations in this lawsuit are sufficient to form the  
18 basis of a claim for personal jurisdiction under the  
19 Massachusetts long-arm statute.

20                  The second fact that the plaintiff identifies in its  
21 opposition is an allegation that appears in its count for the  
22 tortious interference with contract in which the defend- -- the  
23 plaintiff alleges that the entity defendants were, quote, aware  
24 of the -- the employment agreement that the individual  
25 defendants had. And relying on certain case law, the -- the

1 plaintiffs say, well, this allegation is enough. We don't  
2 think so.

3 Again, this is -- the simple fact that my clients may  
4 have been aware of employment agreements, which is something  
5 the plaintiffs will have to prove, is not an act or omission  
6 within the Commonwealth. Plaintiff relies heavily on a series  
7 of decisions in its opposition. One called *Ealing Corp. versus*  
8 *Harrods*, 790 F.2d, 978, a First Circuit decision from 1986.  
9 Another decision called *The Scuderi Group versus LGD Tech*, 575,  
10 F 2d. -- F.Supp 2d 312 from this district, and a state court  
11 case called *Captive, LLC*. In all those cases, the defendants  
12 were out-of-state defendants alleged to have made false  
13 representation to the plaintiff located within the  
14 Commonwealth.

15 In each of these cases, the courts in those cases  
16 found that those statements in the Commonwealth to a plaintiff  
17 were sufficient to have -- to have caused tortious injury by an  
18 act or omission within the Commonwealth.

19 However, your Honor, their -- this case, the case that  
20 has been filed here against our clients does not involve  
21 allegations of misstatements or misrepresentations within the  
22 Commonwealth. In fact, there is no allegation that -- that  
23 Blue Sun or ITGC did anything within this Commonwealth save  
24 apparently potentially being aware of the employment agreement.

25 So for this factor, your Honor, we don't think that

1 plaintiffs have met the burden of showing jurisdiction under  
2 the Massachusetts long-arm statute; and for that reason alone,  
3 this Court can dismiss and we would ask the Court to dismiss  
4 these claims against Blue Sun and ITGC.

5 Separate and apart from the issue of whether or not  
6 plaintiffs have met their burden under the long-arm statute, of  
7 course, plaintiffs also have to meet their burden to show that  
8 the exercise in jurisdiction would be consistent with the due  
9 process clause of the Fourteenth Amendment such that in  
10 language we're all familiar with from first year in law school,  
11 I imagine, does not offend notions -- traditional notions of  
12 fair play and substantial justice.

13 And in that analysis plaintiffs need to prove either  
14 that this Court would have general jurisdiction over the entity  
15 defendants or jurisdiction specific to the allegations in this  
16 case.

17 We do not believe, number one, that plaintiffs can  
18 show general jurisdiction. General jurisdiction only applies  
19 when the contact between the entity or individual in the forum  
20 state are so continuous and systematic as to render it  
21 essentially at home. Neither Blue Sun nor ITG have such  
22 contact. They are not at home here in the Commonwealth of  
23 Massachusetts. They are at home in the State of Maryland.

24 Importantly, plaintiff does not appear to challenge or  
25 contest that issue, and its opposition agrees. Instead,

1 plaintiff moves to a question of whether or not there is  
2 specific jurisdiction over these entity defendants that would  
3 give rise to personal jurisdiction. And in that respect, this  
4 Court needs to apply a three-prong test, namely, one, asking  
5 whether or not the claim arises out of or relates to the  
6 defendants' forum state activities. This is the factor that is  
7 also known as relatedness.

8 The second question is whether or not the defendants'  
9 contacts with the forum state represent a purposeful availment  
10 of the privilege of conducting activities in that state  
11 sufficient to render being haled into the Court foreseeable.

12 And, finally, if, and only if, those two factors are  
13 met whether the exercise of jurisdiction is also reasonable.  
14 Failure to meet any of these factors would doom plaintiff's  
15 attempts to show personal jurisdiction.

16 Again, looking at the complaint, as I've said, the  
17 only two specific allegations against the entity defendants are  
18 some vague unexplained conversations or communications they had  
19 with employees of the plaintiff. There's no -- there's no  
20 attempt to tie those communications to anything that relates to  
21 the allegations in the complaint. It's simply an observation.  
22 It's the reasons I've described. That's not sufficient to show  
23 relatedness because they -- the plaintiff itself does not  
24 relate -- does not allege relatedness over those conversations.

25 And the -- finally, the question is whether or not a

1 very general boilerplate allegation that arises in Count Eight  
2 of plaintiff's complaint in tortious interference count that  
3 the defendants were aware of these employment agreements,  
4 whether that alone is sufficient to meet the relatedness prong  
5 and -- and also, you know, separately, the -- the purposeful  
6 available -- availment prong for questions of specific  
7 jurisdiction. We -- we don't think they're all are in. In  
8 fact, we haven't found any case that would suggest that.

9 Plaintiff's cite and rely heavily on this *Astro-Med*  
10 decision in the First Circuit in 2008, *Astro-Med versus Nihon*  
11 *Kohden, K-O-H-D-E-N, America*. The cite is 591 F.3d 1 in 2008.  
12 The specific jurisdiction exists over the defendants because  
13 the -- these entity defendants were aware of the -- of the  
14 employment contract, but close reading of *Astro-Med*, as we've  
15 pointed out in our reply brief, really does not support  
16 plaintiff's argument. It is true that in *Astro-Med*, the Court  
17 there found that personal jurisdiction or at least the prongs  
18 of relatedness had been satisfied, but there was a very long  
19 list of things that the Court had cited to that were alleged in  
20 the complaint and that the Court found were sufficient to  
21 satisfy the prong of related. These included a lot of detailed  
22 knowledge that the defendant had about the employment  
23 agreement, including where -- about where, first of all, the  
24 plaintiff was located, where the plant that had -- where --  
25 where the defendant had entered into the employment agreement,

1 that there was a contract-specific clause requiring  
2 application, in this case Rhode Island law, that the contract  
3 contained noncompete and nondisclosure provisions, and that  
4 there had been an exclusive consent to the jurisdiction of  
5 Rhode Island courts to resolve any disputes.

6 It is further that the defendant in that *Astro-Med*  
7 case had sought and obtained legal advice with respect to the  
8 analysis of the employment agreements at issue, which the Court  
9 found was an acknowledgment by this defendant that it was  
10 exposing itself to legal risk by hiring the employee in that  
11 case. And none of these specific facts that were alleged in  
12 the *Astro-Med* case appear here.

13 We have one boilerplate complaint that the defendants  
14 were, quote, aware of the employment contract. It doesn't say  
15 how. It doesn't say what we knew. It doesn't say how we knew  
16 it. It doesn't say that we had done an illegal analysis or  
17 received an opinion letter or any other kind of legal advice.  
18 There -- as far as I know, there is no forum-specific clause in  
19 these employment agreements that were required for this case to  
20 be brought in this Court.

21 So none of the factors that were there in *Astro-Med*  
22 have been pled here. And without more, what we're really left  
23 with is an allegation that we knew about the contracts and  
24 somewhere along the line, in some year that's not specified, we  
25 had communications with unidentified employees of the

1 defendant. We don't think that satisfies the relatedness  
2 factor under this specific -- this Court's specific  
3 jurisdiction analysis.

4 We also don't think that it satisfies the Court's  
5 further requirement that we purposely avail ourselves of this  
6 forum, which nothing in the plaintiff's complaint that would  
7 suggest that either Blue Sun or ITGC took any action that would  
8 expose itself knowingly to the jurisdiction of this Court.

9 Your Honor, I'm going to move on and wrap up because I  
10 don't want to take up too much of the Court's time. But for  
11 the reasons I've identified, your Honor, we don't think that  
12 personal jurisdiction exists over these entity defendants, and  
13 we would ask the Court to dismiss Blue Sun and ITGC from this.

14 Thank you.

15 THE COURT: Thank you.

16 Mr. McGee, did you want to respond to that or do you  
17 want to wait until Mr. Wilson finishes?

18 MR. McGEE: It probably makes sense for me to respond  
19 to the jurisdiction arguments now and then --

20 THE COURT: Great.

21 MR. McGEE: -- Mr. Gutkoski, who's also representing  
22 the plaintiff, is going to handle the arguments with respect to  
23 the 12(b) (6) issues that I expect Mr. Wilson is going to raise.

24 THE COURT: All right.

25 MR. McGEE: So we divide them nicely.

1                   THE COURT: Go ahead.

2                   MR. McGEE: All right. Your Honor, with respect to  
3 the long-arm statute -- I'll get right to it. Section 3(c) of  
4 the long-arm statute is what applies here, and it applies to  
5 actions arising from the persons causing tortious injury by any  
6 act or omission in the Commonwealth.

7                   Mr. Ritchie had mentioned that they've set some briefs  
8 in their cases challenging the long-arm jurisdiction  
9 application here. Each of the cases that the entity defendants  
10 have cited do not actually apply to Section 3(c). They all  
11 apply to Section 3(a) or some other sections, which we are not  
12 relying upon here.

13                  The three cases that we did cite, which Mr. Ritchie  
14 made reference to, *The Scuderi Group*, the *Captivate* case, and  
15 the *Ealing* case all do apply the Section 3(c). And we find  
16 that in those cases, it's almost coextensive with the  
17 constitutional analysis and, in fact, the judge in the business  
18 session in the *Captivate* case put it all together and said that  
19 the contact in that case, which was very attenuated,  
20 Massachusetts still satisfied the long-arm statute. In fact,  
21 what had happened there was there was a scheme. I believe the  
22 County Court described it as a scheme, to defraud a company  
23 through setting up a sham corporation, and a husband and wife  
24 were named as defendants. All the real communications went to  
25 the wife or were largely addressed to the wife down in Florida,

1 with no further contacts from Massachusetts, but her husband  
2 had even -- he did not actively take any role in reaching out  
3 to Massachusetts; yet, the Court there found that there was  
4 still sufficient contacts to satisfy the long-arm statute on a  
5 *prima facie* basis, and there's no reason that this Court should  
6 by the long-arm statute do any differently here. And, in fact,  
7 the conduct of the entity defendants, who of course do act  
8 through the individuals employed by the entity defendants is  
9 even closer and has a closer nexus to Massachusetts.

10 Specifically, if you look to reading together  
11 paragraphs 3, 16, 32 through 36 and then 64 through 81 of the  
12 complaint, you will see that KPM maintains its trade secrets  
13 here in Massachusetts. The individual defendants, who prior to  
14 filing the complaint of -- that's paragraphs 32 through 36.  
15 That's Mr. Lucas, Ms. Glenister, Mr. Eilert, Mr. Israelson, and  
16 Mr. Ossowski all have formerly been employed by KPM, but were  
17 at the time of filing of the complaint employed by the  
18 defendant, one of the two entity defendants, which we alleged  
19 in paragraph one of our complaint defined collectively as Blue  
20 Sun, and that's how we allege it throughout the complaint.

21 Those individuals have with them the knowledge that  
22 they took from KPM. You don't get a new job and all of a  
23 sudden forget what you knew at your old job. But then the real  
24 crux here is that Blue Sun acting through these individuals and  
25 probably others took the trade secrets in the form of KPM's

1 application notes that are described in great detail from  
2 paragraphs 64 to 81 of the complaint and they used that. They  
3 posted them publicly on their website. The precise other uses  
4 that they're putting them to, we don't know the full extent of  
5 it, but we do know that they are using that. And that right  
6 there is a much tighter nexus to Massachusetts because it was  
7 the trade secrets in Massachusetts that the defendants  
8 misappropriated and took.

9 With respect to the constitutional questions, I  
10 would -- if your Honor has not yet had an opportunity to, I  
11 would encourage your Honor to look at three cases that are  
12 cited in our brief that really drive home the point that the  
13 facts we have alleged in the verified complaint do, in fact,  
14 satisfy the due process requirements plus the relatedness prong  
15 and the purposeful availment prong. Those three cases are the  
16 *Astro-Med* case, that Mr. Ritchie spoke about; the North  
17 Laminate [sic] case, by the First Circuit from 2005; and then  
18 Judge Burroughs' recent decision from 2019, in the *Conning*  
19 case.

20 What you see in each of those, the common thread  
21 for -- in fact, both the relatedness and the purposeful  
22 availment prong, although they are analyzed separately, is that  
23 when an out-of-state defendant commits an intentional tort,  
24 which is what we have alleged here, when it's -- when it's an  
25 intentional tort, as opposed to something like negligence, they

1 have satisfied the relatedness prong, and I'll just quote from  
2 Judge Burroughs. She says, In tort case of where the defendant  
3 causes plaintiff to suffer an injury in the forum state, the  
4 nexus requirement may be satisfied even if it was not  
5 physically present there. And she goes on to cite both the  
6 *Astro-Med* case and the *North Laminate Sales* case for how in  
7 both of those cases all of the conduct that occurred that led  
8 to the injuries occurred outside the forum state.

9                   In the Court case of *North Laminate Sales*, the conduct  
10 was done in New York, but it was targeting the plaintiff in New  
11 Hampshire.

12                   And then the conduct in the *Astro-Med* case was an  
13 out-of-state employer, California, pursuing an employee of the  
14 plaintiff, who is based in Florida, and the employer, the  
15 plaintiff employer, was based in Rhode Island, and the Court  
16 held in that case that it was sufficient that the injury, the  
17 intentional injury in the forum state was sufficient to create  
18 both the relatedness prong or satisfy both the relatedness  
19 prong and the purposeful availment prong.

20                   And I would -- and I would suggest, your Honor, that  
21 earlier this year in 2021, when the Supreme Court issued its  
22 decision in the *Ford Motor* case it, in fact, reinforced the  
23 notion that we don't -- that there need not be a but-for causal  
24 injury that arises out of the forum state so long as it is  
25 related to the forum state. So Justice Kagan's opinion in that

1 case, which we cited in our brief, and I believe we quoted in  
2 our brief, reinforces the point that *Astro-Med* is still good  
3 law and *North Laminate Sales* is still good law, and that the  
4 *Conning* case is correct.

5 As to anything else, the -- I know Mr. Ritchie did not  
6 address the Gestalt factors, and I'll just mention those  
7 quickly, but we can rely on our brief for those because in each  
8 of those situations -- each of the first four of the Gestalt  
9 factors that potentially look to how efficient the case is  
10 going to be; is there going to be a burden or an undue burden  
11 on the defendants. All of those factors weigh in favor of  
12 maintaining the case here in Massachusetts so that all of the  
13 parties can be litigating in a single jurisdiction so that  
14 there is no risk and inconsistent verdict and that there's no  
15 duplicative discovery, there's no waste of judicial economic  
16 resources.

17 So unless your Honor has any further questions or any  
18 questions, I will rest on my brief.

19 THE COURT: Thank you, Mr. Magee.

20 Mr. Wilson. So I've got you for 15 minutes to talk  
21 about the 12(b) (6) motions.

22 Do you want to do them all at once or seriatim? You  
23 tell me.

24 MR. WILSON: I think it makes sense to do them all at  
25 once.

1                   THE COURT: Okay. Good. I think that works for us  
2 too. Go ahead.

3                   MR. WILSON: And, your Honor, that's a great foray  
4 into -- into our argument, which is the big concern that the  
5 individual defendants have here is is that they need to be  
6 treated individually, that they can't be treated as this  
7 monolithic group that's lumped together.

8                   And so if we parse out the actual allegations against  
9 each of the individual defendants, I think the Court will find  
10 that they failed to satisfy the federal pleading standard.

11                  Oftentimes I'll admit that when I -- when I draft a  
12 brief sometimes we cut and paste the -- you know, the standard  
13 of review section for -- and we quote to *Iqbal* and *Twombly*, and  
14 we -- we really don't get into the -- the guts of what  
15 those -- those decisions held and how they changed the federal  
16 pleading standard. But here given the way that KPM has  
17 asserted their allegations against the individual defendants, I  
18 think it's really important again that we parse them out and  
19 that we address each one individually.

20                  And really the claims break down into really two  
21 buckets. One is are these claims that are based on  
22 misappropriation of trade secrets or disclosure of confidential  
23 information. Each of the claims, except for the breach of the  
24 noncompete agreements, all of those claims are based on this  
25 alleged misappropriation of trade secrets. So we can kind of

1 treat all those as one group.

2 And then, like I said, there are -- there are these  
3 separate claims for breach of two different really noncompete  
4 agreements, one based in Connecticut for some of the  
5 individuals defendants and one based in Massachusetts.

6 And so I'm going to start with -- with talking about  
7 why KPM has not satisfied the *Iqbal* and *Twombly* standard of  
8 stating a plausible claim that each of the individual  
9 defendants misappropriated any KPM trade secrets. And to do  
10 so, understanding I have 15 minutes, I'm still going to try to  
11 go through one by one to -- to parse out the allegations  
12 against each individual defendant, and we'll start with  
13 Mr. Eilert.

14 Notwithstanding the kind of prolix complaint, there's  
15 really only two paragraphs in the entire complaint that  
16 reference Mr. Eilert and any of his conduct.

17 The first is that he sent an email to Mr. and Mrs.  
18 Gajewski about a Unity customer, and, you know, this -- this  
19 email's attached to the complaint. KPM does their best to try  
20 to characterize what this email says and what it means, but  
21 it's attached to the complaint so the Court can look at it and  
22 determine for itself what it means. But what was going on in  
23 that email was that this customer was utilizing an older  
24 application that KPM has -- I think the quote in the email is  
25 deemphasized, and this will be kind of a theme throughout this

1 case which is that, you know, KPM has sort of moved on from  
2 some of its older equipment and is no longer servicing certain  
3 equipment that is -- it's just older.

4 And so in this email, Mr. Eilert says he was talking  
5 to a customer about this application. He specifically says in  
6 the email that he didn't say anything about Blue Sun, but  
7 simply sent an email to Mr. and Mrs. Gajewski saying that  
8 perhaps they should contact this customer to see whether they  
9 could do anything about this -- this deemphasized application  
10 this customer was using.

11 Importantly, the complaint doesn't say anything about  
12 any follow-up action that was taken by Mr. Eilert. It doesn't  
13 say that KPM lost any business from this customer. All we have  
14 is this kind of free-floating email out there that's not tied  
15 really to anything else.

16 The second allegation against Mr. Eilert is that he  
17 received an email from a customer that was considering moving  
18 their business to Blue Sun. Mr. Eilert doesn't even respond in  
19 the email. He doesn't say that he took any action. Again,  
20 other than receiving the email, that's the extent of  
21 Mr. Eilert's conduct. So those are the only two allegations in  
22 the entire complaint again about Mr. Eilert.

23 None of those emails say anything about KPM trade  
24 secrets. They don't say anything about disclosing confidential  
25 information to Blue Sun, simply that he sent one email and he

1 received one email.

2 Next, we'll move to Mrs. Gajewski, and there's really  
3 two -- two allegations against her. One is that she received  
4 the email that I just talked about from Mr. Eilert. And the  
5 second is she received some UPS notifications that some  
6 packages that were sent from the Gajewski household were  
7 delivered.

8 KPM admits in the complaint they have no idea what was  
9 in those packages. And, frankly, they don't even suggest that  
10 the contents of those packages had anything to do with KPM  
11 trade secrets or confidential information. That's it for  
12 Mrs. Gajewski.

13 The next is Ms. Rachael Glenister. Here again, no  
14 allegations whatsoever against her that she used any trade  
15 secrets, disclosed anything to Blue Sun. All it says is that  
16 while she was a KPM employee she was working on certain sales  
17 opportunities is the phrase the complaint uses, and that KPM  
18 lost those sales opportunities, and that they think that those  
19 customers went to Blue Sun.

20 Importantly, though, it does not allege that  
21 Ms. Glenister used any trade secrets or confidential  
22 information to secure those sales on behalf of Blue Sun, only  
23 that she used to work for KPM and now she works for Blue Sun.  
24 That's -- that's really the extent of -- of the allegation.

25 Next is Mr. Greg Israelson. Again, one paragraph in

1 the entire complaint about Mr. Israelson, and that is that he  
2 sent himself a link to KPM that is a known software tool used  
3 for remote copying of files.

4 Again, what's most important is what's not alleged,  
5 right, which is there's no allegation that he actually used the  
6 link to do anything. It doesn't say what he copied or sent to  
7 himself. It doesn't say that it was KPM trade secrets or  
8 confidential information, only that he sent himself the link.

9 The next is Irvin Lucas. Two allegations against  
10 Mr. Lucas. One is that he wiped his KPM computer before  
11 returning it to KPM. And, secondly, that he was the recipient  
12 of two emails after he had resigned from KPM and was working  
13 for Blue Sun that involved KPM -- I think a KPM customer and in  
14 one case a KPM distributor.

15 Again, he wasn't working for KPM at the time, and KPM  
16 doesn't allege that those emails contain any kind of trade  
17 secrets or confidential information or really that Mr. Lucas  
18 did anything improper by the mere receiving of these emails.

19 And then last and perhaps the worst of the bunch, I'll  
20 say is -- is Mr. Philip Ossowski. There is not one allegation  
21 in the entire complaint about Mr. Ossowski. It says that he  
22 worked for KPM and now he works for Blue Sun. And somehow from  
23 those -- those two allegations he is now the defendant  
24 with -- in federal court with, I think, seven claims against  
25 him.

1                   And then we'll move on to Mr. Gajewski. And I will  
2 concede that Mr. Gajewski is on different footing than the  
3 other six. At least he's -- he's referenced in the complaint a  
4 handful of times. But -- but the important thing to note about  
5 the allegations about Mr. Gajewski -- so one is that he was  
6 allegedly the source of these application notes ending up on  
7 Blue Sun's website. And I will concede that I'm still trying  
8 to understand the technology at issue here. It's probably my  
9 own shortcomings that are preventing that from happening, but  
10 we've come up with, I think, a useful analogy that helps  
11 explain kind of what the technology is and what these  
12 application notes are. And that is if you think of these  
13 devices, these spectrometers as a camera, they kind of take a  
14 photograph of a sample usually in this case it seems like  
15 different food products and that -- that -- that camera creates  
16 a picture, and I think that these application notes to kind of  
17 be -- analogize to being a photograph that comes from  
18 the -- from the camera. And, of course, the picture that comes  
19 out of that camera is not a trade secret. It's not  
20 confidential information. Perhaps the technology that  
21 underlies the camera, the software, the hardware, what actually  
22 creates the photograph, that may be a trade secret. But that's  
23 not what was -- that was uploaded here. It was simply the  
24 equivalent of a photograph that not surprisingly came from or  
25 was found -- excuse me -- on Mr. Gajewski's KPM laptop, which

1       shouldn't be a surprise. He -- he was working there at the  
2       time. He was utilizing this information. It can't be  
3       misappropriation if he simply accessed information that you  
4       were allowed to access. And so the idea that somehow  
5       he's -- he's transferred, you know, source code and calibration  
6       steps and all this other information, the simple uploading of  
7       an application note, which was kind of like a photograph, it  
8       doesn't support -- the inference that KPM is asking the Court  
9       to draw, I think, is too -- a bridge too far here.

10           And then lastly, you know, the question is even some  
11       of these -- this information, these calibrations that's what  
12       they're referred to in the complaint. This is really  
13       information that KPM has received from customers over the  
14       years; and even keeping the, you know, the complaint, or the  
15       allegations within the four corners of the complaint, they  
16       received this information from customers. It's not their  
17       information, so it can't be their trade secret.

18           And so, again, going back to the main point here,  
19       which is if we parse out the allegations against each  
20       individual defendant, certainly against all of them, there  
21       are -- there is insufficient facts alleged to plausibly state  
22       any kind of claim for misappropriation of trade secrets.

23           In their opposition KPM suggests, well, once we've got  
24       a chance to take some discovery, you know, we can fill in some  
25       of the gaps. But, of course, that's not the -- that's not the

1 standard that we apply really in any court, particularly not in  
2 federal court. KPM's required to plausibly state a claim, and  
3 then they get to take discovery. So we would ask the Court  
4 to -- to dismiss all of the claims against the individual  
5 defendants that are based on some kind of trade secret or  
6 misappropriation.

7 I'll quickly move on to the -- the claim for breach of  
8 the noncompete. Three of the individual defendants have  
9 identical noncompetition agreements. They have Connecticut  
10 choice of law provisions. And under Connecticut law, a  
11 five-part test is applied to determine the reasonableness of a  
12 restrictive covenant. We've laid them out in our briefing, but  
13 they are -- I'll focus on four of them for the purposes of this  
14 motion.

15 One is the length of time of the restriction. One is  
16 the geographic scope. The third is the degree of protection  
17 that's necessary to protect legitimate business interests. And  
18 then the fourth is whether the restrictions imposed on the  
19 employee would impact their ability to stay within their chosen  
20 occupation.

21 The Connecticut noncompetes in this case have a  
22 two-year restricted covenant that is effectively global in  
23 scope. It's anywhere that KPM or any of its affiliates do  
24 business.

25 We -- we argued in our motion to dismiss that that is

1 effectively a global noncompete; and in their opposition, KPM  
2 doesn't seem to dispute that. So on their face, a two-year  
3 global restriction, we think, is overbroad and no additional  
4 discovery is necessary to -- to alter that analysis.

5 But what I would really like to focus on is this third  
6 point, and that is whether the -- the scope of the noncompete  
7 are necessary to protect a legitimate business interest of KPM,  
8 and the real problem with these noncompetes is their scope  
9 prohibits the employees from working and I quote, in any manner  
10 for any company that's engaged in the -- and I'll again use the  
11 language of the agreement -- in the design and manufacture,  
12 marketing, sale, licensing or research and development relating  
13 to the business, which is a defined term, or related to those  
14 products, technologies, developments, inventions, improvements,  
15 or technical information associated with the business.

16 And so effectively what these agreements do is  
17 they -- they prohibit these individual defendants from working  
18 in any matter for any business that has anything to do with AR  
19 technology. We use the example in our -- in our motion to  
20 dismiss it would prevent them from working in the mail room.  
21 It would prevent them from providing janitorial services. It  
22 would prohibit them from working on an NIR product that does  
23 not compete with any of KPM's products. And there's simply no  
24 legitimate business interest that KP has -- KPM has to prevent  
25 these folks from doing so.

1                   And what's important is under the Connecticut -- under  
2 Connecticut law a finding of unreasonableness on any of these  
3 criteria is sufficient to render the covenant unenforceable.  
4 And so again going back to KPM's argument that, well, we need  
5 some discovery. It's too early to decide whether or not that  
6 these restrictions are reasonable. Not so. There is no  
7 discovery that could unearth a fact that would somehow make  
8 these extremely broad covenants reasonable, and so we think  
9 it's appropriate to -- to have them dismissed on a 12(b) (6)  
10 motion.

11                   Lastly, is the restriction on -- on the employee's  
12 ability to pursue their occupation. These folks work in NIR  
13 technology. I think it's a relatively small field, and  
14 effectively these folks would be out of their chosen field, a  
15 field that they have years of experience in for two years. And  
16 again, all the discovery in the world isn't going to make that  
17 more reasonable.

18                   I'll quickly move on to Mr. Ossowski's noncompete,  
19 which is unique because it was on a different forum, and it's  
20 governed by Massachusetts law. And, importantly, it was signed  
21 after the recent -- I guess not so recent anymore, but the  
22 Massachusetts Noncompetition Agreement Act, which became  
23 effective October 1, 2018, which significantly changed the  
24 landscape in terms of enforcement of noncomp- -- noncompete  
25 agreements in Massachusetts.

1                   The act sets forth several what they call minimum  
2 requirements for a noncompete to be enforceable in  
3 Massachusetts. Two at least are applicable here. One is if  
4 the agreement is entered into at the commencement of  
5 employment, the agreement must expressly state that the  
6 employee has the right to consult with counsel. Mr. Ossowski's  
7 agreement is attached to the complaint. It clearly doesn't  
8 contain that language.

9                   The act also requires that the agreement has to be  
10 supported by a guarded lead or other mutually agreed upon  
11 consideration that's specified in the agreement. Once again,  
12 Mr. Ossowski's agreement contains no such language. We raised  
13 these arguments in our motion to dismiss on behalf of  
14 Mr. Ossowski. KPM did not address them at all. It made no  
15 effort to argue that the agreement complies with Massachusetts  
16 law. It completely glossed over it and, therefore, has  
17 effectively, I think, conceded that his agreement is not  
18 enforceable in Massachusetts and should therefore be dismissed.

19                   Very quickly, the last issue --

20                   THE COURT: You're out -- you're out of time,  
21 Mr. Wilson. Sorry.

22                   MR. WILSON: Okay. I think the last issue, which is  
23 Mrs. Gajewski's Connecticut forum selection clause, we'll rely  
24 on our briefing, and I think your Honor can -- can decide it  
25 that way.

1                   Thank you, Mr. Wilson.

2                   Mr. Gutkoski, why don't you go. And talk to me about  
3 anything you want, but particularly the complaint, the count  
4 again Mr. Ossowski.

5                   MR. GUTKOSKI: Your Honor, KPM concedes on the face of  
6 his agreement that Mr. Ossowski's agreement does not comply  
7 with the changes to Massachusetts law.

8                   THE COURT: Thank you. Thank you for your candor.

9                   MR. GUTKOSKI: In contrast, your Honor, we believe as  
10 set forth in our briefing that the noncompete -- seeing we  
11 started with the noncompete, so I'll just address that under  
12 the additional three defendants under Connecticut law. The  
13 defendants are asking for a determination of reasonableness.

14                   What is reasonable? What is inappropriate scope  
15 limitation regarding limitations that should be enforced  
16 against the defendants based on two main factors?

17                   One, what they have done; and two, what they have done  
18 and its impact on KPM. As I will get into in a moment about  
19 the trade secret allegations and the discovery that has been  
20 conducted already under your Honor's order, what we are -- what  
21 we have alleged and what we are learning is that their  
22 misconduct is extensive both in duration going on for multiple  
23 years, both in terms of its duplicitousness in that it was  
24 being engaged in while they were -- these defendants were  
25 employed at KPM for months, in some cases years, working on

1 Blue Sun's behalf and under Blue Sun's name with KPM customers  
2 that are located across the country.

3 We see it in regard to multiple services and multiple  
4 products and are just learning now the impact that it -- that  
5 those actions are having on KPM, its ongoing relationships with  
6 these customers, and its ability to practice its -- its normal  
7 business practices of renewing those relationships on a yearly  
8 basis. And so the evolution of the case and additional  
9 discovery is going to reveal facts that go directly to the  
10 reasonableness and necessity of enforcing these restrictions in  
11 order to determine what is reasonably necessary for the fair  
12 protection of KPM's business.

13 It is inappropriate on these facts and under the cases  
14 cited by the defendants to make any rulings on the permissible  
15 scope under Connecticut law of the noncompetes for those three  
16 defendants.

17 Turning now to the additional arguments raised by  
18 Mr. Wilson, KPM notes that Mr. Wilson is very careful and was  
19 very careful to limit his comments to what is actually alleged  
20 in the complaint, which is fair focus for a motion to dismiss.  
21 However, here we have moved beyond what was initially set forth  
22 in the complaint. We have exchanged thousands of documents  
23 between the parties, and what those, as we dig through them,  
24 those documents and communications show is exactly what I  
25 feared when I spoke to your Honor regarding the -- when last we

1 met regarding the motion for expedited discovery, namely, that  
2 what was set forth in the complaints was just the tip of the  
3 iceberg. What we have seen since then and we were able to give  
4 your Honor immediately after that hearing one such additional  
5 fact that was set forth in Docket No. 43, my -- my letter of  
6 May 19th, that was enclosing an additional email that we found  
7 before the production. And I'll represent to the Court that  
8 the discovery that has been conducted since then has shown  
9 dozens of additional emails involving each and every one of the  
10 individual defendants, including Mr. Ossowski, engaged in  
11 misrepresenting to KPM's customers that they were working on  
12 behalf of KPM when they, in fact, were offering services and  
13 providing services on behalf of Blue Sun confusing customers as  
14 to whether they were working for Blue Sun or KPM; confusing  
15 customers as to whether or not Blue Sun was in effect  
16 associated with KPM or a new name of KPM or a new division of  
17 KPM; and proceeding to not only offer services but provide  
18 services on KPM's analyzer products as Blue Sun and in some  
19 cases divert the payment from those customers that the  
20 customers thought they were paying to KPM instead to Blue Sun.

21 THE COURT: So Mr. Gutkoski, I'm -- you understand I  
22 am required to focus on your complaint, not on what you have  
23 learned from discovery?

24 MR. GUTKOSKI: And therein we have two potential  
25 approaches that I would suggest to the Court. One is looking

1 at the four corners of the complaint, we set forth the specific  
2 allegations that we were aware at that time upon filing the  
3 complaint as to each of the individual defendants and their use  
4 and misuse and misrepresentation with these customers between  
5 paragraphs 40 to 53. We believe that those are sufficient  
6 under a Rule 8 notice standard or under the *Iqbal-Twombly*  
7 standard in setting forth plausible and more than speculative  
8 allegations regarding improper use of the trade secrets. What  
9 you heard from Mr. Wilson today was arguing about facts,  
10 mischaracterizing or recharacterizing emails, telling you what  
11 application notes were and were not, and trying to minimize the  
12 conduct that was pled in those paragraphs regarding each of  
13 these defendants.

14 On the -- within the four corners of the complaint, we  
15 believe we've satisfied the necessary pleading standards and  
16 the -- the requirements under *Iqbal* and *Twombly* regarding the  
17 trade secret counts. We also believe that we have satisfied  
18 from a pleading standpoint allegations setting forth adequate  
19 claims for the breach of contract, the breach of the duty of  
20 loyalty, the 93A claims that Mr. Wilson didn't address, and  
21 that each of the conduct -- pieces of conduct regarding the  
22 actions of each of the individual defendants as set forth in  
23 the complaint sets forth actionable claims supporting each of  
24 those counts; and therefore, we contend that the motion to  
25 dismiss should be denied on the basis of the allegations there.

1           However, in addition, we point out to your Honor that  
2 should the Court dismiss the existing complaint in terms of  
3 what we have now learned, we would quickly be in a situation  
4 where we could refile the complaint with additional allegations  
5 and additional specifics as to each of the defendants.

6           That seems to us to be form over substance. Not only  
7 is our actual complaint sufficient, but our next complaint will  
8 be even more detailed and more sufficient. These defendants  
9 are in no way prejudiced regarding knowing what they're being  
10 accused of, knowing the actions that they were involved in,  
11 knowing the where and when of their conduct because it's on the  
12 face of their own emails. There is no question, no doubt about  
13 their ability to defend themselves. They've produced thousands  
14 of pages of documents and will soon under the Court's order sit  
15 for depositions at least as the entity defendants and  
16 Mr. Gajewski in an attempt to try to justify their -- their --  
17 their behavior. But there is no question what the behavior  
18 here alleged is and that it supports each of our allegations  
19 not only for the trade secret counts, but the additional state  
20 law counts as well.

21           For those reasons, both the sufficiency of the  
22 complaint itself and the practicality of the situation, we find  
23 ourselves in as a matter of honest truth, we would ask that the  
24 motions be denied.

25           THE COURT: Mr. Gutkoski, what specific trade secrets

1 does the complaint allege that Rachael Glenister  
2 misappropriated?

3 MR. GUTKOSKI: In order -- what it alleges is that  
4 Ms. Glenister reached out and facilitated the provision of  
5 services by Blue Sun to KPM's customers to service KPM  
6 machines.

7 In order to service KPM machines, one must make use of  
8 KPM's data and software, the very specific trade secrets that  
9 we have alleged have been misappropriated here by the  
10 defendants; and therefore, in order for Ms. Glenister to  
11 facilitate those actions, those services and the provision of  
12 those services by anyone other than KPM, and instead by Blue  
13 Sun, it by definition requires the use of KPM's trade secrets.

14 THE COURT: I feel like I'm chasing my tail.

15 All right. Thank you, everybody. Nice job. We are  
16 going to take it under advisement, and we will let you know  
17 something soon.

18 Thank you.

19 MR. GUTKOSKI: Thank you, your Honor.

20 MR. MAGEE: Thank you, your Honor.

21 MR. RITCHIE: Thank you, your Honor.

22 (At 3:50 p.m., court was adjourned.)

23

24

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## C E R T I F I C A T E

3 I, Marianne Kusa-Ryll, Certified Realtime  
4 Reporter, do hereby certify that the foregoing transcript is a  
5 true and accurate transcription of our stenographic notes in  
6 Case No. 21cv10572, KPM Analytics North America Corporation vs.  
7 Blue Sun Scientific, LLC, on June 12, 2021, to the best of my  
8 knowledge, skill, and ability.

/s/ Marianne Kusa-Ryll 3-29-2025  
Marianne Kusa-Ryll, RDR, CRR  
Official Court Reporter